IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10469 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE Y.B.BHATT

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

==========

MULCHANDBHAI LAVJIBHAI PATEL

Versus

STATE OF GUJARAT

Appearance:

MR IS SUPEHIA for Petitioner No. 1-7
MR HD DAVE, ASST. GOVT. PLEADER for Respondent No. 1-3

CORAM : MR.JUSTICE Y.B.BHATT

Date of decision: 12/09/2002

ORAL JUDGEMENT

1. This is a petition filed by the petitioners herein under Article 226 of the Constitution of India, invoking and seeking protection of their fundamental

rights guaranteed by Article 14 and 16 of the Constitution. The petitioners are un-armed and armed police constables serving in various police stations of Sabarkantha District. Initially each of the petitioners was appointed as police constable in various other districts, but on their request, each of them was transferred to the Sabarkantha District. In short, each of the petitioners is serving in the Sabarkantha District on acceptance of their request-transfer.

1.1 The controversy and grievance raised in the present petition arises on account of the fact that the petitioners have been denied the benefit of higher grade/scale on completion of nine years of service. The petitioners assert that the benefit of higher grade/scale has been denied to them on the basis of a Government Resolution dated 16th August 1994, which is at Annexure 'A' to the petition. In this context it was vehemently urged that the very same G.R. at Annexure 'A' would have permitted them to avail of such benefit if they had not been transferred on their own request. In other words, the petitioners contend, and which is also the case of the respondents, that the benefit of the higher grade/scale would be available to all persons who have served for nine years in the lower grade/scale, except those who have been transferred on their own request.

1.2 The petitioners further contend that there is another G.R. of the same date, viz. 16th August 1994, which is at Annexure 'I' to the petition, which applies only to Teachers. In this context it is further contended that the said G.R. at Annexure 'I' also permits such employees as are Teachers to avail of the benefit of the higher grade/scale, eventhough they have been transferred on their own request. It is, therefore, contended that the benefits conferred on Teachers at Annexure 'I' and denied to the petitioners as police constables under Annexure'A', creates hostile discrimination, and that although both classes of employees are similarly situated, to the extent that they are serving at the transferred postings on the basis of their own request, the benefit of higher grade/scale at the end of 9 years is available to Teachers, and is denied to police constables.

2. It requires to be noted that the basic controversy is not that police constables would be denied the benefits of higher grade/scale under the G.R. at Annexure 'A'. It is also not the controversy that police constables would be denied the benefits on account of their transfer from one district to another due to

exigencies of service. The controversy raised in the present petition and consequently the grievance made therein, arises only because such benefits are denied to the police constables because they have been transferred to another district on their own request.

2.2 There is no controversy that on a request-transfer from one district to another, the person would be placed at the bottom of the seniority list of the district to which he has sought request-transfer. In these circumstances, it was urged by the petitioners that merely because they are at the bottom of the seniority list, would not and should not deprive them of the benefit of the higher grade/scale at the end of 9 years service merely because the transfer was on their own request and merely because they have not put in nine years service in the district where they were transferred.

2.3 It goes without saying that where such police constables had already put in 9 years of service in a given district, and were then transferred to another district on their own request, would not deprive them of the benefit of the higher grade/scale. This view has been established by a decision in the case of Ajitsinh Chaturji Rathod reported at 2000 (1) GLH 73 and which decision was confirmed in L.P.A. No. 779 of 2000 by judgment and order dated 4th December 2000. However, this principle, though recognized in law, has no direct application to the facts and the controversy in the present case. So far as the present petition is concerned, it is the petitioners' own case that they would be eligible for the higher grade/scale on completion of 9 years of service, only if the tenure of the service in the old district [prior to the transfer] was clubbed with the tenure of the service in the new district [after the transfer].

2.4 It is, therefore, precisely this last issue which this Court is required to address. In short, if an employee had completed nine years service in one district, he could not be denied the higher grade/scale under the G.R. at Annexure 'A'. Further more, such a benefit could not be extended to those persons who had completed nine years of service, calculated by clubbing together the tenure in the pre-transfer district with the tenure in the post-transfer district, as long as such transfer was due to the exigencies of service. The question which then arises is a very small and limited question, viz, merely because the transfer was on the request of the employee, can he be denied the benefit of

the 9 years rule, by not permitting the clubbing of the tenure of service in the pre-transfer district with the tenure of service in the post-transfer district?

3. It was sought to be contended by the learned counsel for the respondents that various circulars have been issued by the Home Department of the State, which clarified the application of the impugned G.R. at Annexure 'A'. According to the learned counsel for the respondents, all these circulars, whether read individually or collectively, only lends support to the view expressed in the G.R. at Annexure 'A'.

3.1 This contention cannot be entertained for a number of reasons. Firstly, circulars which may have been issued by the Home Department of the State are only clarificatory in nature, and are issued with a view to make the administration and application of the G.R. in question more smoother and effective. It is obvious that circulars do not have the status in law which a G.R. has. Therefore, circulars which merely emphasize the applicability of the G.R. cannot, in any manner, add to or support the legality of the G.R., where such legality is lacking. The second reason this contention cannot be entertained is that all the circulars sought to be referred to by the learned counsel for the respondents are prior to the date of the impugned G.R. at Annexure 'A', i.e. 16th August 1994. Thus, even if such circulars were taken into consideration, they cannot amplify or support the impugned G.R. at Annexure 'A'. The third reason why this submission cannot be countenanced is that none of the circulars sought to be referred to by the learned counsel for the respondents are on the record of the present petition. In fact, it requires to be noted that the respondents herein have not even filed an affiadvit-in-reply to the petition. For this reason also, the factual averments made by the petitioners in this petition require to be accepted inasmuch as they have not been controverted at all.

4. The center of controversy as identified in the present petition, is completely covered by a decision of the Supreme Court in the case of Scientific Adviser to Raksha Mantri vs. V.M. Joseph [1998 AIR SCW 2226]. In this decision, the Supreme Court has also referred to and relied upon, for the purpose of drawing a parallel, an earlier decision of the Supreme Court reported at 1996 (1) SCC 524. In this decision, the Supreme Court has clearly laid down that the eligibility for promotion and seniority are two distinct and different factors. In the said decision the Supreme Court held that where an

employee has been transferred to another place on his own request, and the employee has been placed at the bottom of the seniority list at the transferred place, merely on this account the period of service rendered by the employee at the earlier place cannot be excluded from consideration in determining his eligibility for promotion. In other words, the Supreme Court has clearly enunciated the principle that merely on account of request-transfer, in considering the eligibility of the employee for the purpose of any benefits which would otherwise be due to him, his length of service at the place prior to the transfer cannot be excluded. On a correct reading of this decision, it becomes obvious that this is a decision on the basic principles of dealing with the criteria required to be kept in mind while dealing with the eligibility of an employee for certain benefits at the transferred place. While dealing with such criteria, the Supreme Court held that while determining the eligibility of such an employee, the services put in by such employee prior to the transfer, even if the transfer is at his own request, cannot be excluded. Once this principle is accepted, as it must be, it necessarily follows that whether the employee is being considered for promotion or being considered for grant of benefit of the nine year rule, makes no difference whatsoever to the application of the basic principle laid down in this decision.

5. In the premises aforesaid, I have no hesitation in concluding that the petitioners would be entitled to be considered for the grant of higher grade/scale by considering the total length of service, by clubbing together the tenure of the pre-transfer and the post-transfer services in the two districts [or more, as the case may be], even if such transfers were on their own request.

6. In the context of the aforesaid discussion, learned counsel for the petitioners specifically states that prayer 'A' as also prayer 'AA' made in paragraph 13 of the petition, are not pressed.

7. In the light of the aforesaid discussion, the respondents are directed to grant higher grade/scale to the petitioners, by taking into account the services rendered in other districts as well [for the purpose of computing nine years of service], if otherwise eligible, from the due date, and to grant all consequential benefits.

7.1 Consequently, this petition is allowed, and rule

is made absolute to the aforesaid extent, with costs.

7.2 It is expected that the respondents will grant the relief to the petitioners in the light of the aforesaid decision as expeditiously as possible, and preferably within three months from today. Direct service is permitted.

(Y.B. BHATT, J.)

mathew